No. 18-266

IN THE
# Supreme Court of the United States

THE DUTRA GROUP,
*Petitioner*,

v.

CHRISTOPHER BATTERTON,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENT


PRESTON EASLEY
LAW OFFICES OF
PRESTON EASLEY APC
2500 Via Cabrillo Marina
Suite 106
San Pedro, CA 90721
(310) 832-5315

DAVID C. FREDERICK
*Counsel of Record*
BRENDAN J. CRIMMINS
BENJAMIN S. SOFTNESS
LILLIAN V. SMITH
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)


February 21, 2019

## QUESTION PRESENTED

Whether punitive damages may be awarded in a personal-injury suit alleging a breach of the general maritime duty to provide a seaworthy vessel.

## TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... v

INTRODUCTION ..... 1

STATEMENT ..... 2

A. Types Of Actions Available For Injured Crewmembers Under General Maritime Law And The Jones Act ..... 2

B. *Miles* And *Townsend* Addressed Remedies Available For The Injury Or Death Of A Crewmember ..... 5

1. *Miles* clarified the compensatory damages available in wrongful-death cases ..... 5

2. *Townsend* addressed punitive damages available under general maritime causes of action pre-dating the Jones Act ..... 9

C. Procedural History ..... 10

SUMMARY OF ARGUMENT ..... 13

ARGUMENT ..... 16

I. PUNITIVE DAMAGES MAY BE AWARDED FOR BREACH OF THE DUTY TO FURNISH A SEAWORTHY VESSEL ..... 16

A. *Townsend* Supplies The Controlling Principles ..... 16

1, The unseaworthiness cause of action was well-established when Congress passed the Jones Act ..... 17

2. Under *Townsend*, the Jones Act does not preclude the pre-existing punitive-damages remedy ..... 20

B. Petitioner's Efforts To Distinguish *Townsend* Fail ..... 21

1. *Townsend* rejects limiting pre-existing general maritime remedies based on overlap among the Jones Act and general maritime law claims ..... 22

2. The evolution of the unseaworthiness liability standard does not undermine the availability of the punitive-damages remedy ..... 23

3. Congress enacted the Jones Act against a judicial acceptance of punitive damages in unseaworthiness actions ..... 25

C. *Miles* Addressed The Remedy For A Newly Created Cause Of Action And Does Not Apply To Remedies And Claims That Pre-Dated The Jones Act ..... 30

II. IN ANY EVENT, THE JONES ACT PERMITS PUNITIVE DAMAGES ..... 32

A. The Jones Act And FELA Permit Punitive Damages ..... 32

1. FELA's text authorizes recovery of "damages" without limitation ..... 33

2. Pre-FELA common law permitted punitive damages ..... 34

B. Petitioner Fails To Show That Punitive Damages Are Precluded Under Either FELA Or The Jones Act ..... 36

1. No decision of this Court makes punitive damages unavailable under FELA ..... 37

2. The lower-court decisions on which petitioner relies are in error ..... 38

III. DISALLOWING PUNITIVE DAMAGES WOULD CONTRAVENE CENTURIES OF FEDERAL POLICY ..... 43

A. Punitive Damages Promote Important Maritime Policies ..... 43

B. Petitioner's Policy Arguments Are Unsound ..... 44

CONCLUSION ..... 49

## TABLE OF AUTHORITIES

Page

CASES

*American R.R. Co. of Porto Rico v. Didricksen*, 227 U.S. 145 (1913) ..... 38

*Anderson v. General Motors Corp.*, No. BC116926, 1999 WL 34868593 (Cal. Super. Ct. Aug. 26, 1999) ..... 46

*Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009) ..... *passim*

*Bell v. Hood*, 327 U.S. 678 (1946) ..... 34

*Boston Mfg. Co. v. Fiske*, 3 F. Cas. 957 (C.C.D. Mass. 1820) (No. 1,681) ..... 17

*Calcaterra v. Iovaldi*, 100 S.W. 675 (Mo. Ct. App. 1906) ..... 42

*Calo v. Ocean Ships, Inc.*, 57 F.3d 159 (2d Cir. 1995) ..... 40

*Carlisle Packing Co. v. Sandanger*, 259 U.S. 255 (1922) ..... 19, 20

*Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) ..... 2

*Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) ..... 5, 34, 35, 36, 40

*Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932) ..... 5, 23

*Day v. Woodworth*, 54 U.S. (13 How.) 363 (1852) ..... 17

*Dixon v. The Cyrus*, 7 F. Cas. 755 (D. Pa. 1789) (No. 3,930) ..... 3, 18

*Dooley v. Korean Air Lines Co.*, 524 U.S. 116 (1998) ..... 39

*Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987) ..... 11

*Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) .....3, 15, 20, 43, 45, 46, 47, 48

*Farrell v. United States*, 336 U.S. 511 (1949)..... 3

*Figueroa v. Campbell Indus.*, 45 F.3d 311 (9th Cir. 1995)..... 40

*Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963) ..... 5, 23

*Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60 (1992) ..... 34

*Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156 (1968) ..... 5, 39

*Gulf, Colo. & S. Fe Ry. Co. v. McGinnis*, 228 U.S. 173 (1913) ..... 38

*Halverson v. Nisen*, 11 F. Cas. 310 (D. Cal. 1876) (No. 5,970)..... 18

*Harden v. Gordon*, 11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6,047)..... 2, 44

*Isbrandtsen Co. v. Johnson*, 343 U.S. 779 (1952) ..... 36

*Kemezy v. Peters*, 79 F.3d 33 (7th Cir. 1996) ..... 43, 46, 47

*Koehler v. United States*, 200 F.2d 588 (7th Cir. 1953)..... 40

*Kopczynski v. The Jacqueline*, 742 F.2d 555 (9th Cir. 1984).....38, 39, 40, 41

*Kozar v. Chesapeake & O. Ry. Co.*, 449 F.2d 1238 (6th Cir. 1971)..... 39

*Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893) .....17, 35

*Latchtimacker v. Jacksonville Towing & Wrecking Co.*, 181 F. 276 (C.C.S.D. Fla.), *aff'd*, 184 F. 987 (5th Cir. 1910) ..... 29

*Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944) ..... 3, 19

*McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958) ..... 5, 21, 26

*McBride v. Estis Well Serv., L.L.C.*, 853 F.3d 777 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 644 (2018) ..... 40

*McGuire v. The Golden Gate*, 16 F. Cas. 141 (C.C.N.D. Cal. 1856) (No. 8,815) ..... 17, 44

*Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59 (1913) ..... 7, 8, 28, 33, 34, 38, 39, 40, 42

*Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) ..... *passim*

*Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (6th Cir. 1993) ..... 39

*Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U.S. 489 (1876) ..... 35

*Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960) ..... 4, 25

*Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) ..... 31

*Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) ..... 5, 6, 7, 31, 44

*Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135 (2003) ..... 35

*Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811 (2001) ..... 31

*Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015 ..... 30

*Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) ..... 43

*Pacific S.S. Co. v. Peterson*, 278 U.S. 130 (1928) ..... 38

*Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924) ..... 4

*Philadelphia, W. & B. R.R. Co. v. Quigley*, 62 U.S. (21 How.) 202 (1859) ..... 35

*Santa Fe Pac. R.R. Co. v. Holmes*, 202 U.S. 438 (1906) ..... 35

*Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974) ..... 6

*Seaboard Air Line Ry. v. Koennecke*, 239 U.S. 352 (1915) ..... 37

*Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) ..... 19

*Smith v. Wade*, 461 U.S. 30 (1983) ..... 34

*St. Louis, Iron Mountain & S. Ry. Co. v. Craft*, 237 U.S. 648 (1915) ..... 37-38, 40

*Texas & Pac. Ry. Co. v. Swearingen*, 196 U.S. 51 (1904) ..... 35

*The A. Heaton*, 43 F. 592 (C.C.D. Mass. 1890) ..... 28

*The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818) ..... 17

*The Arizona v. Anelich*, 298 U.S. 110 (1936) .....19, 21

*The City of Carlisle*, 39 F. 807 (D. Or. 1889) ..... 27

*The Edith Godden*, 23 F. 43 (S.D.N.Y. 1885)..... 19

*The Noddleburn*, 28 F. 855 (D. Or. 1886), *aff'd*, 30 F. 142 (C.C.D. Or. 1887).....27, 28

*The Osceola*, 189 U.S. 158 (1903).....3, 4, 19, 20, 21, 23, 28

*The Rolph*:

293 F. 269 (N.D. Cal. 1923), *aff'd*, 299 F. 52 (9th Cir. 1924).....25, 26, 27

299 F. 52 (9th Cir. 1924) .....26, 27

*The Sea Gull*, 21 F. Cas. 909 (C.C.D. Md. 1865) (No. 12,578)..... 32

*The Troop*:

118 F. 769 (D. Wash. 1902), *aff'd*, 128 F. 856 (9th Cir. 1904)..... 27

128 F. 856 (9th Cir. 1904) ..... 29

*United States v. Texas*, 507 U.S. 529 (1993)..... 36

*Vaughn v. Farrell Lines, Inc.*, 937 F.2d 953 (4th Cir. 1991)..... 47

*Vella v. Ford Motor Co.*, 421 U.S. 1 (1975) ..... 3

*Warren v. United States*, 340 U.S. 523 (1951) ..... 25

*Wildman v. Burlington N.R.R. Co.*, 825 F.2d 1392 (9th Cir. 1987)..... 39

*Wilkerson v. McCarthy*, 336 U.S. 53 (1949) ..... 35

CONSTITUTION AND STATUTES

U.S. Const. art. III, § 2, cl. 1 ..... 3

An Act Relating to the liability of common carriers by railroad for their employees in certain cases, ch. 149, § 1, 35 Stat. 65, 65 (1908) ..... 33

Federal Employers' Liability Act, 45 U.S.C. §§ 51-59 ..... *passim*

45 U.S.C. § 51 ..... 5, 33, 37

Jones Act, 46 U.S.C. § 30104 ..... *passim*

Lord Campbell's Act, 9 & 10 Vict. ch. 93 (1846) ... 7, 42

Merchant Marine Act of 1920, ch. 250, 41 Stat. 988 ..... 4

§ 33, 41 Stat. 1007 (codified as amended at 46 U.S.C. § 30104) ..... 4

28 U.S.C. § 1292(b) ..... 11

42 U.S.C. § 1983 ..... 34

OTHER MATERIALS

*Black's Law Dictionary* (1891) ..... 33

*Black's Law Dictionary* (2d ed. 1910) ..... 33

GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY (2d ed. 1975) ..... 24

William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, REGULATION 33 (Sept./Oct. 1986) ..... 46, 47

Susan Lee, *Cruise Industry Liens Against the U.S. Penalty Wage Act*, 31 TUL. MAR. L.J. 141 (2006) ..... 46

Virginia A. McDaniel, *Recognizing Modern Maintenance and Cure as an Admiralty Right*, 14 Fordham Int'l L.J. 669 (1991) ..... 25

Andrew B. Nick, *Market Share Liability & Punitive Damages: The Case for Evolution in Tort Law*, 42 COLUM. J.L. SOC. PROBS. 225 (2008) ..... 48

David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73 (1997) ..... 41, 45

Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1 (1992) ..... 48

2 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES (1912) ..... 17

Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 F.S.U. L. Rev. 653 (1993) ..... 48-49

JABEZ G. SUTHERLAND, THE LAW OF DAMAGES (4th ed. 1916):

Vol. 2 ..... 17

Vol. 5 ..... 40, 42

J. Hoult Verkerke, Note, *Compensating Victims of Preferential Employment Discrimination Remedies*, 98 YALE L.J. 1479 (1989) ..... 49

## INTRODUCTION

In *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), this Court held that punitive damages are available in general maritime actions by injured members of a vessel's crew for failure to provide maintenance and cure. *Townsend* also held that the Jones Act does not eliminate that remedy. As the court of appeals correctly recognized, *Townsend* compels the conclusion that respondent Christopher Batterton can seek punitive damages for petitioner's breach of the general maritime duty to provide a seaworthy vessel.

Petitioner offers no sound reason for depriving a vessel's crewmembers of the ability to seek punitive damages in appropriate cases of unseaworthiness or for shielding maritime bad actors from the deterrent effect of those damages. *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), does not mandate that result. As the *Townsend* Court recognized, *Miles* addressed the scope of a wrongful-death action that this Court created under the general maritime law to match wrongful-death provisions in federal statutes, most notably the Jones Act. Because the Court had been guided by congressional action in creating a new cause of action for wrongful death, the Court tailored the scope of that action to mirror the existing wrongful-death actions established by Congress. *Townsend* held that "nothing in *Miles* or the Jones Act" limits the relief available when, as here, both the general maritime cause of action and the remedy existed before the Jones Act. 557 U.S. at 407.

Petitioner's theory fails for the additional reason that its key premise – the unavailability of punitive damages under the Jones Act – is incorrect. The Jones Act incorporates the Federal Employers'

Liability Act ("FELA"), which governs the civil liability of railroads for injuries to railway workers. FELA (and thus the Jones Act) permits punitive damages because it provides for the recovery of "damages" without any textual limitation. Punitive damages fall within the plain meaning of "damages" and were a well-established form of damages under pre-FELA common law. Because FELA and the Jones Act permit punitive damages, affirmance would be required even if, contrary to *Townsend*, those statutes controlled respondent's remedies under pre-existing general maritime law.

## STATEMENT

### A. Types Of Actions Available For Injured Crewmembers Under General Maritime Law And The Jones Act

Life at sea is extremely dangerous. "Seamen" – masters or members of a ship's crew, *see Chandris, Inc. v. Latsis*, 515 U.S. 347, 355-56, 368-72 (1995) – "are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour." *Harden v. Gordon*, 11 F. Cas. 480, 483 (C.C.D. Me. 1823) (No. 6,047) (Story, J.). For that reason, crewmembers are "emphatically the wards of the admiralty," entitled under federal maritime law to "a peculiar, protecting favor and guardianship." *Id.* at 485.

Under maritime law, crewmembers receive a "trilogy of heightened legal protections . . . because of their exposure to the 'perils of the sea.'" *Chandris*, 515 U.S. at 354. The first two of those heightened protections arise under the general maritime law formed through judicial precedent, and the third is statutory. Maritime law "falls within a federal court's jurisdiction to decide in the manner of a

common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489-90 (2008) (citing U.S. Const. art. III, § 2, cl. 1).

The first heightened protection is maintenance and cure. Under general maritime law, a crewmember who "falls sick, or is wounded, in the service of the ship" is entitled to recover "maintenance and cure" – that is, food and lodging (maintenance) and adequate medical treatment (cure) – to the point of "maximum cure." *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 413 (2009); *Farrell v. United States*, 336 U.S. 511, 513-19 (1949); *see Vella v. Ford Motor Co.*, 421 U.S. 1, 3-5 (1975). A crewmember who is denied maintenance and cure has a cause of action under general maritime law against the employer. *See Townsend*, 557 U.S. at 412-14.

Second, maritime law protects the rights of crewmembers to work aboard a seaworthy vessel. As early as 1789, federal courts recognized the "engagement[] of the captain to the mariners . . . that[,] at the commencement of a voyage, the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy." *Dixon v. The Cyrus*, 7 F. Cas. 755, 757 (D. Pa. 1789) (No. 3,930). By 1903, this Court recognized the "general consensus of opinion among the circuit and district courts" to "allow[] an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness." *The Osceola*, 189 U.S. 158, 175 (1903).

A shipowner is liable for harms caused by "furnishing an unseaworthy" vessel. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 100 (1944). That "absolute" duty is not a standard of "perfection" or a requirement

"to furnish an accident-free ship." *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960). Rather, the duty is to provide "a vessel reasonably suitable for her intended service." *Id.*

The third component of the trilogy is the Jones Act. In *The Osceola*, this Court held that, whereas the unseaworthiness action permitted an injured crewmember to sue for injuries caused by the unseaworthy condition of the ship, no cause of action allowed recovery for negligent acts of the master or a crewmember. *See* 189 U.S. at 173-75. Congress plugged that gap when it passed § 33 of the Merchant Marine Act of 1920,[1] referred to as the Jones Act. *See Townsend*, 557 U.S. at 415 ("Congress enacted the Jones Act primarily to overrule *The Osceola*").

The Jones Act provides that "[a] seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer." 46 U.S.C. § 30104. The Act defines the scope of the "civil action" that may be brought by reference to the federal laws "regulating recovery for personal injury to, or death of, a railway employee." *Id.* Congress thus incorporated the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-59. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 23, 32-33 (1990); *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 391-92 (1924).

FELA provides that employers "shall be liable in damages" for "injury or death resulting in whole or in part from the negligence of any of the [employers'] officers, agents, or employees," or "by reason of any

---

[1] Act of June 5, 1920, ch. 250, § 33, 41 Stat. 988, 1007 (codified as amended at 46 U.S.C. § 30104).

defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U.S.C. § 51. FELA's text does not limit recoverable "damages," and this Court has long permitted injured railroad workers to recover both pecuniary damages (such as for lost wages) and non-pecuniary damages (such as for pain and suffering).[2]

In some cases, conduct subject to a Jones Act suit also gives rise to a claim under general maritime law. *See Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 18 (1963); *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 374-75 (1932). In those cases, the general maritime law claims remain available. *See McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 222 n.2, 224 (1958).

### B. *Miles* And *Townsend* Addressed Remedies Available For The Injury Or Death Of A Crewmember

This Court previously considered the types of compensatory damages available in actions arising from the death of a crewmember (*Miles*) and the availability of punitive damages under general maritime law (*Townsend*).

#### 1. *Miles* clarified the compensatory damages available in wrongful-death cases

At common law, there was no remedy for a tort resulting in death. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 380-86 (1970). General

---

[2] *See Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 556 (1994) (allowing recovery of damages "for emotional injury caused by fear of physical injury"); *Gruenthal v. Long Island R.R. Co.*, 393 U.S. 156, 161-62 (1968) (upholding recovery for pain and suffering).

maritime law initially followed that approach and did "not afford a cause of action for wrongful death." *Miles*, 498 U.S. at 23. In *Moragne*, the Court cited "the wholesale abandonment of the rule" against recovery for wrongful death in federal and state statutes, including the Jones Act, in holding that "an action does lie under general maritime law for death caused by violation of maritime duties." 398 U.S. at 388, 409. "*Moragne* did not set forth the scope of the damages recoverable under the maritime wrongful death action." *Miles*, 498 U.S. at 30.

In *Miles*, the Court addressed the types of compensatory damages available in a general maritime action arising from a crewmember's death. The worker in *Miles* had been killed by a fellow crewmember. *Id.* at 21. The decedent's mother sued on her own behalf and as the representative of the estate, alleging Jones Act negligence and breach of the duty to maintain a seaworthy vessel. *Id.* In her individual capacity, she sought recovery for her son's wrongful death, including damages for loss of financial support and services from her son and for "loss of society." *Id.* at 21-22; *see Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 585 (1974) ("The term 'society' embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection."). As representative of her son's estate, she brought a survival action seeking compensation for her son's pain and suffering prior to his death and for his "lost future income." *Miles*, 498 U.S. at 22.[3]

---

[3] The Jones Act allows for both a wrongful-death action and a survival action. *See Miles*, 498 U.S. at 23-24, 33. In a wrongful-death action, a decedent's family and other dependents seek

This Court granted review to address "two questions concerning the scope of damages under general maritime law" – whether damages for "loss of society" are available "in a general maritime wrongful death action" and whether general maritime law permits "a survival action for decedent's lost future earnings." *Id.* at 22-23.

In considering the first question, the Court looked to the Jones Act because that statute had provided the basis for recognizing the general maritime action for wrongful death of a crewmember. *See id.* at 23-24, 30 (discussing *Moragne*). The Court observed that, in *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59 (1913), it had construed FELA's wrongful-death provision in light of the first recorded wrongful-death statute, Lord Campbell's Act, and state statutes that followed. *Miles*, 498 U.S. at 32.

FELA's wrongful-death provision, like the statutes on which it was modeled, does not permit recovery by family members for deceased workers' losses. *See Vreeland*, 227 U.S. at 68 (wrongful-death recovery "includes no damages which [the deceased] might have recovered for his injury if he had survived"). Instead, they create "a new or independent cause of action" enabling family members to recover for "deprivation of the pecuniary benefits which the benefi-

---

recovery for *their* losses resulting from the death – that is, what *they* would have received but for the deceased's untimely demise. *See Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 68-70 (1913). In a survival action, a representative of the decedent's estate seeks recovery for the *decedent's* injuries suffered before death. A survival statute enables any claim the deceased had at the time of death to survive and be pursued on behalf of the estate. *See Miles*, 498 U.S. at 33 ("[A] seaman's right of action for injuries due to negligence survives to the seaman's personal representative.").

ciaries might have reasonably received if the deceased had not died from his injuries." *Id.* at 69, 70. The compensatory damages that can be recovered in such an action are limited to "compensation for pecuniary loss or damage." *Id.* at 71. They do not include non-pecuniary damages such as "damages by way of recompense for grief or wounded feelings." *Id.* at 70.

In *Miles*, the Court reasoned that, by incorporating FELA into the Jones Act, Congress must have intended to incorporate "the *Vreeland* gloss" as well. 498 U.S. at 32. The Court concluded that "[]consisten[cy]" with the Jones Act's restriction on non-pecuniary compensatory damages in wrongful-death actions required limiting wrongful-death recoveries in general maritime actions in the same way. *Id.* at 32-33. Accordingly, the Court held, "there is no recovery for loss of society" – a "non-pecuniary loss" – "in a general maritime action for the wrongful death of a Jones Act seaman." *Id.* at 31, 33.

On the second question presented, the *Miles* Court declined to address whether general maritime law provides a right of survival. *See id.* at 34. Instead, the Court held that, if such a right exists under general maritime law, it does not allow for recovery of income the deceased would have earned but for death. *See id.* The Court reasoned that, because the Jones Act's "survival provision limits recovery to losses suffered during the decedent's lifetime," it would not "create" a broader remedy for lost post-death earnings under general maritime law. *Id.* at 36. The Court did not question the propriety of the jury's award of $140,000 under the Jones Act's survival provision for the deceased crewmember's pain and suffering before death. *See id.* at 22, 33-36.

**2. *Townsend* addressed punitive damages available under general maritime causes of action pre-dating the Jones Act**

In *Townsend*, the Court held there is "no legal obstacle" to the recovery of punitive damages in an action under general maritime law for failure to pay maintenance and cure. 557 U.S. at 408. In reaching that conclusion, the Court first traced the history of the common law in both England and the United States and concluded that "[p]unitive damages have long been an available remedy at common law for wanton, willful, or outrageous conduct." *Id.* at 409. The Court next established that the general rule permitting punitive damages "extended to claims arising under federal maritime law." *Id.* at 411. The Court then reasoned that "[n]othing in maritime law undermines the applicability of this general rule in the maintenance and cure context." *Id.* at 412. The Court also held that the Jones Act provides no basis "for overturning the common-law rule" permitting punitive damages because it "did not eliminate pre-existing remedies available to seamen." *Id.* at 415.

The *Townsend* Court rejected the argument that *Miles* required restricting the damages available under general maritime law. It "was only because of congressional action that a general federal cause of action for wrongful death . . . even existed; until then, there was no general common-law doctrine providing for such an action." *Id.* at 420. Having relied on the Jones Act to recognize a general maritime law remedy for wrongful death, *Miles*'s reasoning was "sound" in refusing to infuse that *new* general maritime law claim with a remedial scope beyond that of the statutory provision it had been crafted to match. *Id.*

That reasoning did not apply in *Townsend*, the Court held. Because "both the general maritime

cause of action (maintenance and cure) and the remedy (punitive damages)" pre-dated the Jones Act, it was "possible to adhere to the traditional understanding of maritime actions and remedies without abridging or violating the Jones Act." *Id.* The Court also explained that, because the scope of recovery under the Jones Act was not "determinative of" common-law remedies, it did not need to address the "argument that the Jones Act . . . prohibits the recovery of punitive damages in actions under that statute." *Id.* at 424 n.12.

**C. Procedural History**

1. Respondent Christopher Batterton was a Jones Act seaman employed as a deckhand aboard the SCOW 3 in waters off the California coast. *See* App. 2a; First Am. Compl. ¶¶ 2, 5, *Batterton v. Dutra Grp.*, No. 14-CV-07667 PJW, ECF No. 11 (C.D. Cal. Oct. 14, 2014) ("Compl."). In August 2014, a hatch cover on the vessel blew open as a result of pressurized air that had been allowed to build up in the compartment covered by the hatch. App. 2a-3a; Compl. ¶ 5. The hatch cover slammed into respondent's left hand, crushing it and leaving him permanently disabled and in need of ongoing medical care. Compl. ¶¶ 5, 11. The pressure built up because, among other reasons, the SCOW 3 lacked a "safe exhaust mechanism" or "relief valve" that could have relieved the pressure, and because petitioner directed the crew to close additional air vents. *Id.* ¶¶ 10, 15.

Respondent brought suit in the Central District of California alleging Jones Act negligence, breach of the duty to provide maintenance and cure, and breach of the duty to provide a seaworthy vessel. As to the last count, respondent alleged that petitioner "willfully, wantonly and callously breached the . . .

warranty of seaworthiness" and requested "punitive damages." *Id.* ¶ 17.[4]

**2.** Petitioner moved to strike or dismiss respondent's request for punitive damages. Relying on *Miles*, petitioner argued that recovery under the Jones Act is limited to "pecuniary losses"; that punitive damages should be considered "non-pecuniary" damages and therefore unavailable under the Jones Act; and that the asserted unavailability of punitive damages under the Jones Act should preclude recovery of punitive damages in an unseaworthiness action. Def.'s Mot. To Strike Punitive Damages from the Compl. or in the Alternative To Dismiss for Failure To State a Claim upon Which Relief Can Be Granted at 3, *Batterton v. Dutra Grp.*, No. 14-CV-07667 PJW, ECF No. 13-1 (C.D. Cal. Nov. 3, 2014).

The district court denied the motion, relying on Ninth Circuit precedent holding that "punitive damages are available in unseaworthiness claims under general maritime law." App. 20a (citing *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987)). The court then certified the issue for immediate appeal under 28 U.S.C. § 1292(b), *see* App. 32a, and the Ninth Circuit accepted the appeal, *see* App. 2a.

**3.** The Ninth Circuit affirmed. App. 1a-15a. The court explained it was bound by its prior decision in *Evich*, which "squarely held that punitive damages are available under general maritime law for claims of unseaworthiness." App. 3a (alteration omitted). The court rejected petitioner's argument that *Miles* "overruled *Evich*." App. 13a. It recognized that

---

[4] Respondent did not seek punitive damages on the Jones Act claim because Ninth Circuit precedent, binding on the district court, holds that those damages are not permitted under the Jones Act. *See* App. 3a.

"limitations" on "recoveries" by family members "for wrongful death," which the *Miles* Court addressed, "have no application to general maritime claims by living seamen for injuries to themselves," such as respondent's claim. App. 14a. The court also questioned petitioner's premise that rejecting recovery of non-pecuniary damages should necessarily preclude punitive damages. App. 10a-11a, 13a. "[I]t is not apparent," the court stated, "why barring damages for loss of society" – a form of compensatory damages – "should also bar punitive damages." App. 10a. "That a widow may not recover damages for loss of the companionship and society of her husband has nothing to do with whether a ship or its owners and operators deserve punishment for callously disregarding the safety of seamen." App. 11a.

The Ninth Circuit also held that, "under *Townsend*, we would reach the same conclusion *Evich* did, even if we were not bound by *Evich*." App. 15a. It cited *Townsend*'s recognition that, "[h]istorically, punitive damages have been available and awarded in general maritime actions" and that "nothing in *Miles* or the Jones Act eliminates that availability." App. 12a (alteration in original). Because "[u]nseaworthiness is a general maritime action long predating the Jones Act," the court saw "no persuasive reason to distinguish maintenance and cure actions" addressed in *Townsend* "from unseaworthiness actions with respect to the damages awardable." App. 12a, 14a. In light of *Townsend*, the Ninth Circuit perceived no inconsistency between permitting punitive damages for unseaworthiness claims and denying them for Jones Act claims. App. 3a.

## SUMMARY OF ARGUMENT

**I.A.** This Court's decision in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), compels affirmance. *Townsend* established that the common-law tradition permitting punitive damages extended to claims brought under general maritime law and that the Jones Act does not eliminate pre-existing general maritime claims and remedies.

This case is on all fours with *Townsend*. Both the cause of action (unseaworthiness) and the remedy (punitive damages) were well-established when Congress enacted the Jones Act. There is no evidence that unseaworthiness cases were excluded from the general rule permitting punitive damages. Therefore, under *Townsend*, injured crewmembers are entitled to seek punitive damages in appropriate unseaworthiness actions, regardless of whether punitive damages can be recovered under the Jones Act.

**B.** None of petitioner's three asserted bases for distinguishing *Townsend* has merit. *First*, overlap between the unseaworthiness action and the Jones Act action does not render *Townsend* inapplicable. *Townsend* addressed and rejected the same argument with respect to maintenance and cure, which also overlaps with the Jones Act, explaining that the "quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct causes of action." 557 U.S. at 423-24.

*Second*, evolution in the standards for determining liability for unseaworthiness does not differentiate this case from *Townsend*. The unseaworthiness cause of action itself was well-established before the Jones Act's passage, and developments in the *liability* standard do not suggest any change in the available *remedies*, such as punitive damages.

*Third*, petitioner fails to show, as *Townsend* requires, that unseaworthiness was affirmatively excluded from the general rule permitting punitive damages. On the contrary, reported decisions demonstrate that punitive damages were available for wanton breaches of the duty to furnish a seaworthy vessel.

C. *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), does not control here because it addressed the scope of a wrongful-death action that this Court created in response to federal statutes providing similar relief. *Miles* deferred to Congress in fashioning the scope of a general maritime law action that owed its existence to congressional legislation. As *Townsend* held, *Miles* does not require limiting remedies when, as here, the general maritime law cause of action and remedy were not created in light of, but instead pre-dated, the pertinent federal statutes.

**II.A.** Under *Townsend*, punitive damages are available in respondent's unseaworthiness cause of action, regardless of whether they could be recovered under the Jones Act. Accordingly, it is not necessary to determine whether punitive damages can be recovered under the Jones Act to decide this case.

In any event, the Jones Act and the Federal Employers' Liability Act ("FELA") (which the Jones Act incorporates) permit punitive damages. FELA's text provides broadly for "damages" with no limitation as to the type of damages. Under pre-FELA common law, to which this Court looks in interpreting that statute, punitive damages were available in personal-injury actions brought by railroad workers against their employers. Construed in light of its common-law background, FELA permits punitive damages, and the Jones Act therefore does as well.

B. Petitioner ignores the statutory text and common-law background. It bases its contrary interpretation on inapposite snippets from decisions of this Court that described the compensatory damages available under FELA and the Jones Act, but did not address the availability of punitive damages. Petitioner also relies heavily on lower-court decisions that erroneously conflate the unique limitations on the compensatory damages available in wrongful-death cases with the availability of punitive damages in personal-injury cases.

III.A. Punitive damages have a long-established and firmly rooted place in American law generally and in maritime law in particular. In appropriate cases, punitive damages serve important purposes of punishing egregious misconduct and deterring the defendant and others from committing further bad acts. Punitive damages are especially important in the maritime personal-injury context. Crewmembers of vessels in navigation do dangerous work under the total control of the ship's master. Maritime law protects those workers with principles that punish and deter outrageous conduct that otherwise might arise far from the scrutiny of shore.

B. Petitioner's policy arguments are inconsistent with *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), are economically incoherent, and do not justify deviating from *Townsend*. Notably, although punitive damages have been available for decades in major maritime circuits, petitioner produces no example of an inappropriately high punitive-damages award in an unseaworthiness case.

## ARGUMENT

### I. PUNITIVE DAMAGES MAY BE AWARDED FOR BREACH OF THE DUTY TO FURNISH A SEAWORTHY VESSEL

"Historically, punitive damages have been available and awarded in general maritime actions," and they remained available following passage of the Jones Act, as this Court held in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 407, 415-24 (2009). Nothing excepts unseaworthiness from that general rule. The Court's treatment in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), of an "entirely different question" concerning compensatory damages in wrongful-death actions is not to the contrary. *Townsend*, 557 U.S. at 419.

#### A. *Townsend* Supplies The Controlling Principles

This Court in *Townsend* established three "settled legal principles" that are decisive here. 557 U.S. at 414. *First*, "punitive damages have long been available at common law." *Id.* *Second*, "the common-law tradition of punitive damages extends to maritime claims." *Id.* *Third*, absent evidence that a particular general maritime claim was "excluded from this general admiralty rule," an injured crewmember "is entitled to pursue punitive damages." *Id.* at 414-15.

The first and second *Townsend* principles are not disputed. Nor could they be. As the Court recognized in *Townsend*, "prior to enactment of the Jones Act in 1920, maritime jurisprudence was replete with judicial statements approving punitive damages, especially on behalf of passengers and seamen." *Id.* at 412. *Townsend*'s careful historical treatment of the issue, *see id.* at 409-12, is buttressed by

ample support throughout the judicial and scholarly volumes.[5]

The third *Townsend* principle is satisfied as well: unseaworthiness has existed comfortably within the firmament of maritime law for more than 200 years, and there is no evidence that unseaworthiness was excluded from the rule permitting punitive damages.

### 1. The unseaworthiness cause of action was well-established when Congress passed the Jones Act

Like the maintenance-and-cure cause of action addressed in *Townsend*, the unseaworthiness cause

---

[5] *See Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 108 (1893) ("courts of admiralty . . . proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages"); *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558 (1818) ("if this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages"); *McGuire v. The Golden Gate*, 16 F. Cas. 141, 143 (C.C.N.D. Cal. 1856) (No. 8,815) (noting that, in tort, "the aggrieved party would be entitled to recover not only actual damages but exemplary"); *Boston Mfg. Co. v. Fiske*, 3 F. Cas. 957, 957 (C.C.D. Mass. 1820) (No. 1,681) (Story, J.) ("In cases of marine torts, or illegal captures, it is far from being uncommon in the admiralty to allow costs and expences, and to mulct the offending parties, even in exemplary damages, where the nature of the case requires it."); 2 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 599b, at 1156 (1912) ("Exemplary damages are awarded in Admiralty, as in other jurisdictions."); 2 JABEZ G. SUTHERLAND, THE LAW OF DAMAGES § 392, at 1264, 1272 (4th ed. 1916) ("Sutherland on Damages") (noting the "'well established principle of the common law that in . . . all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offense, rather than the measure of compensation to the plaintiff,'" and explaining that that principle held in "courts of admiralty") (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852)).

of action was "well established before the passage of the Jones Act." *Townsend*, 557 U.S. at 420. As early as 1789, a federal court recognized that, "at the commencement of a voyage, the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy." *Dixon v. The Cyrus*, 7 F. Cas. 755, 757 (D. Pa. 1789) (No. 3,930). *The Cyrus* concerned a counterclaim by a ship captain against his crew, seeking a judgment that they forfeited their wages when, having "discovered that [the ship] was very badly provided with running rigging" such that they could not "clue the sails without going aloft to search for the proper ropes," the crew "refused to weigh anchor, or proceed with the vessel in her present condition." *Id.* at 756. The court rejected the counterclaim, noting that, when "there is a manifest and visible deficiency" with a ship, "the mariners may reasonably complain and remonstrate." *Id.* at 757.

By 1876, federal law recognized that a seaman's successful claim for unseaworthiness could yield damages. *See Halverson v. Nisen*, 11 F. Cas. 310 (D. Cal. 1876) (No. 5,970). In *Halverson*, the vessel was found to be seaworthy, *see id.* at 311, but the court did not question the proposition that "[i]f, by the owner's negligence, the rigging or apparel are defective, and the seaman sustains an injury in consequence, the owner would be liable." *Id.* at 310. There was no mention of an exclusion from the "general admiralty rule" that punitive damages would be among those available. *Townsend*, 557 U.S. at 414-15.

In 1885, another federal court recognized the availability of damages for breach of the warranty of seaworthiness, rejecting the proposition that, under "maritime law," liability "extends only to proper care

and nursing, and the expenses of cure" (maintenance and cure). *The Edith Godden*, 23 F. 43, 46 (S.D.N.Y. 1885). Rather, the court held, "[t]here is no question that in modern maritime law the owners are responsible for due care and diligence in the proper equipment of the vessel for the contingencies of the voyage." *Id.*; *see also The Osceola*, 189 U.S. 158, 173-75 (1903) (citing additional cases).

Seventeen years before the Jones Act's passage, this Court recognized it "as settled" that "the vessel and her owner are ... liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." *The Osceola*, 189 U.S. at 175. That principle has been "settled law" in this Court since *The Osceola*: "[t]hat an owner is liable to indemnify a seaman for an injury caused by the unseaworthiness of the vessel or its appurtenant appliances and equipment has been settled law in this country ever since The Osceola." *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90 (1946); *see Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 99 (1944) (unseaworthiness liability "has been settled law since ... The Osceola" and "was generally applied, before its statement in The Osceola, by numerous decisions of the lower federal courts during the last century") (citation omitted); *The Arizona v. Anelich*, 298 U.S. 110, 121 (1936) ("In declaring in The Osceola ... that the owner and vessel were liable to indemnify seamen for injuries caused by unseaworthiness ..., this Court adopted the pronouncements of many earlier cases in admiralty in which the rule was applied or recognized.").

This Court applied the unseaworthiness doctrine in a 1922 decision governed by pre-Jones Act law, *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255

(1922). In affirming an injured crewmember's damages judgment, the *Carlisle* Court held that the failure to instruct the jury on the pre-Jones Act bar to recovery for crewmember negligence (*see The Osceola*, 189 U.S. at 175; *supra* p. 4) was harmless because the jury would have been permitted to find unseaworthiness liability on the same facts. *See* 259 U.S. at 258-60.

As with maintenance and cure, nothing in maritime law indicates that the general rule permitting punitive damages was inapplicable in unseaworthiness actions. *See Townsend*, 557 U.S. at 412 ("Nothing in maritime law undermines the applicability of this general rule in the maintenance and cure context."). Neither *The Osceola*, which petitioner credits (at 4) with recognizing unseaworthiness as a basis for damages, nor any other pre-Jones Act unseaworthiness case suggested that the unseaworthiness cause of action restricted plaintiffs to a limited or nontraditional set of remedies.

**2. Under *Townsend*, the Jones Act does not preclude the pre-existing punitive-damages remedy**

The fact that unseaworthiness was not excluded from the general common-law rule is dispositive under *Townsend*. Respondent is "entitled to pursue punitive damages unless Congress has enacted legislation departing from th[e] common-law understanding." *Townsend*, 557 U.S. at 415. As this Court squarely held, the Jones Act did not do that: "the Jones Act preserves common-law causes of action." *Id.* at 417; *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488-89 (2008) (rejecting argument that federal statute precluded punitive damages under general maritime law).

The *Townsend* Court explained that the Jones Act cannot be read to have "eliminate[d] pre-existing remedies" for two key reasons. 557 U.S. at 415-16. *First*, the Jones Act granted plaintiffs "the right to 'elect' to bring a Jones Act claim, thereby indicating a choice of actions for seamen – not an exclusive remedy." *Id.* at 416. The Court observed that "the then-accepted remedies for injured seamen arose from general maritime law," citing *The Osceola*, which recognized causes of action not only for maintenance and cure but also for unseaworthiness. *Id.* As the Court concluded, "it necessarily follows that Congress was envisioning the continued availability of those common-law causes of action" because, "[i]f the Jones Act had been the only remaining remedy available to injured seamen, there would have been no election to make." *Id.*; *see McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 225 (1958) (plaintiff permitted to "sue for both unseaworthiness and Jones Act negligence" although he cannot obtain double recovery for same injury).

*Second*, the Court looked to the Jones Act's remedial purpose for confirmation that Congress did not displace the general maritime law punitive-damages remedy. Reading the Jones Act to *reduce* the scope of existing common-law remedies would contravene this Court's consistent recognition "that the Act 'was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it.'" *Townsend*, 557 U.S. at 417 (quoting *The Arizona*, 298 U.S. at 123).

### B. Petitioner's Efforts To Distinguish *Townsend* Fail

None of petitioner's three asserted grounds for distinguishing this case from *Townsend* has merit.

### 1. *Townsend* rejects limiting pre-existing general maritime remedies based on overlap among the Jones Act and general maritime law claims

Petitioner incorrectly contends (at 22-24) that unseaworthiness should be treated differently from maintenance and cure addressed in *Townsend* because only unseaworthiness "is an alternative cause of action to Jones Act negligence" and seeks compensation for "the same injury caused by the same accident." *See also* Chamber of Commerce et al. Amici Br. 15 ("The Jones Act and unseaworthiness claims have overlapping remedies.").

The argument fails because the same can be said of maintenance and cure, as the *Townsend* Court recognized. The *dissent* in *Townsend* contended that "any personal injury maintenance and cure claim in which punitive damages might be awarded could be brought equally under either general maritime law or the Jones Act." 557 U.S. at 427 (Alito, J., dissenting). The dissent thus argued – as petitioner does here – that the Court should adopt "a rule that applies uniformly under general maritime law and the Jones Act." *Id.*

The *Townsend* Court accepted the premise but rejected the conclusion. The "fact that seamen commonly seek to recover under the Jones Act for the wrongful withholding of maintenance and cure," the Court held, "does not mean that the Jones Act provides the only remedy for maintenance and cure claims." *Id.* at 422-23 (majority). "The laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct causes of action." *Id.* at 424; *see also id.* at 423

n.10 ("The fact that, in some cases, a violation of the duty of maintenance and cure may also give rise to a Jones Act claim is significant only in that it requires admiralty courts to ensure against double recovery.") (citation omitted).

That analysis applies equally here. Remedies for "negligence, *unseaworthiness*, and maintenance and cure . . . , when based on one unitary set of circumstances, serve the same purpose of indemnifying a seaman for damages caused by injury, depend in large part upon the same evidence, and involve some identical elements of recovery." *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 18 (1963) (emphasis added). When a crewmember's Jones Act and unseaworthiness claims "overlap[]," it is the crewmember's "privilege, in so far as the causes of action covered the same ground, to sue indifferently on any one of them." *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 374-75 (1932). The fact that general maritime law claims sometimes "overlap[]" with Jones Act claims is no basis for limiting general maritime remedies to "the lowest common denominator approved by Congress." *Townsend*, 557 U.S. at 424.

**2. The evolution of the unseaworthiness liability standard does not undermine the availability of the punitive-damages remedy**

The evolution of unseaworthiness from a due-diligence obligation to a strict-liability tort does not differentiate this case from *Townsend*. *Cf.* Pet. Br. 24-26. There is no question that the unseaworthiness action was "recognized" (Pet. Br. 24) before the Jones Act's enactment. *See The Osceola*, 189 U.S. at 175; *supra* pp. 17-20. That is dispositive under *Townsend*. The fact that the *liability* rules for

unseaworthiness evolved after 1920 does not suggest any evolution in the *remedies* available for unseaworthiness, let alone suggest that unseaworthiness was excluded from the general rule permitting punitive damages, as would be required under *Townsend*. Indeed, it is anomalous to suppose that, in making unseaworthiness liability easier to establish, courts *sub silentio* eliminated or restricted punitive damages when the employer acted maliciously or wantonly.

Unseaworthiness's eventual inclusion of harm without fault is irrelevant for the additional reason that punitive damages lie only in cases in which fault is established. *See Townsend*, 557 U.S. at 409 ("wanton, willful, or outrageous conduct"). Punitive damages cannot be "founded on strict liability" (*Miles*, 498 U.S. at 36) alone. Respondent alleges the appropriate level of fault – that petitioner "willfully" and "wantonly" breached the duty to furnish a seaworthy vessel. Compl. ¶ 17. That allegation would raise a valid unseaworthiness claim even under *pre*-Jones Act law.

Moreover, unseaworthiness is no different from maintenance and cure in those respects. The obligation to provide maintenance and cure is a strict-liability duty. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 6-6, at 281 (2d ed. 1975) (maintenance and cure "is a liability without fault which is based on the employment relationship"). Exposure to punitive damages arises from the aggravated failure to provide maintenance and cure, just as the aggravated breach of the seaworthiness duty exposes the employer to punitive damages.

In addition, like unseaworthiness, maintenance and cure also evolved in the decades following the Jones Act. Although the doctrine limits plaintiffs to

recovering for injuries suffered "in the service of the ship," *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 543 (1960), this Court in the 1940s and 1950s expanded that term to cover accidents affecting seamen while ashore on leave. *See, e.g., Warren v. United States*, 340 U.S. 523, 529 (1951) (explaining "reasons for extending maintenance and cure to shore leave cases" in 1943 and extending it still further); Virginia A. McDaniel, *Recognizing Modern Maintenance and Cure as an Admiralty Right*, 14 Fordham Int'l L.J. 669, 675 (1991) ("[T]he U.S. Supreme Court has consistently expanded maintenance and cure rights."). Petitioner ignores that history in erroneously asserting (at 25) that maintenance and cure "did not undergo a post-Jones Act revolution at all."

**3. Congress enacted the Jones Act against a judicial acceptance of punitive damages in unseaworthiness actions**

The lack of "evidence" that unseaworthiness claims were "excluded from" the general rule permitting punitive damages means that respondent is presumptively "entitled to pursue" those damages. *Townsend*, 557 U.S. at 414-15. To prevail under *Townsend*, petitioner would have to identify "cases establishing that [punitive] damages were historically unavailable for breach of the duty" to provide a seaworthy vessel, *id.* at 418, and it cites none (at 30-33).

In fact, several reported decisions demonstrate the traditional availability of punitive damages in unseaworthiness actions. One such case concerned "a most amazing and dramatic situation": the ship's first mate, a 285-pound man, "all bone and muscle, and with a reputation for ferocity as wide as the seven seas," assaulted several of the vessel's crewmembers. *The Rolph*, 293 F. 269, 269-70 (N.D. Cal. 1923), *aff'd*,

299 F. 52 (9th Cir. 1924).[6] The court held that, under the circumstances, *The Rolph* "was not a seaworthy vessel." *Id.* at 272; *see Miles*, 498 U.S. at 22 (recounting court of appeals' holding that crewmember's "extraordinarily violent disposition demonstrated that he was unfit and therefore that the *Archon* was unseaworthy as a matter of law").

The court awarded one of the plaintiffs, who had been severely beaten, the then-substantial sum of $10,000, *see The Rolph*, 293 F. at 272, even though that plaintiff had "recovered in another proceeding for wages and maintenance" and made "no claim . . . for expenses and cure," 299 F. at 54. Two other plaintiffs received $500, *see* 293 F. at 272, even though they *"did not claim any personal injury," id.* at 269 (emphasis added). The court explained that the question before it was "*not alone* [the] question even of the award of proper compensation," but rather how to address "ill treatment of the seamen" and to ensure "that youth of America should be attracted to the sea" and sailors "not be subject to such treatment." *Id.* at 271, 272 (emphasis added). Without using the words "punitive" or "exemplary," the court left no doubt that it was "not" merely awarding "compensation" for injuries sustained. *Id.* at 271.

In *Townsend*, this Court pointed to two pre-Jones Act decisions in which vessel owners failed to provide

---

[6] Although *The Rolph* was decided shortly after the passage of the Jones Act, the court applied pre-Jones Act general maritime law because the case arose during the period of time when plaintiffs believed they had to choose to bring *either* a Jones Act claim or an unseaworthiness claim. *See McAllister*, 357 U.S. at 222 n.2 ("Recent authorities have effectively disposed of suggestions in earlier cases that an injured seaman can be required to exercise an election between his remedies for negligence under the Jones Act and for unseaworthiness.").

proper medical care for injured crewmembers and the courts awarded damages "that appear to contain at least some punitive element." 557 U.S. at 414 (discussing *The City of Carlisle*, 39 F. 807 (D. Or. 1889), and *The Troop*, 118 F. 769 (D. Wash. 1902), *aff'd*, 128 F. 856 (9th Cir. 1904)). Those cases are properly considered unseaworthiness cases, as well as cases involving failure to provide maintenance and cure. Although the courts did not use the term, the vessels in both cases were unseaworthy for the same reason *The Rolph* was: the vessel owners failed "to select men worthy to command their vessels and fit to be trusted with the safety and welfare of their crews." *The City of Carlisle*, 39 F. at 817; *see The Rolph*, 299 F. at 54 (to be seaworthy, vessel must "be properly equipped, and for that purpose there is a duty upon the owner to provide a master and crew generally competent").

The court in *The Noddleburn*, 28 F. 855 (D. Or. 1886), *aff'd*, 30 F. 142 (C.C.D. Or. 1887), expressly considered awarding exemplary damages in an unseaworthiness action. While the plaintiff crewmember was working atop the mast of the ship, a "seizing . . . gave way," causing the plaintiff to fall "30 or 40 feet" to the deck and to sustain serious injuries. *Id.* at 855-56. The facts showed that, "[s]hortly before the accident," another crewmember had attempted to repair what was known to be the faulty seizing but was "recalled" and reprimanded by the master, thus leaving the "line not repaired," and demonstrating the master's "actual knowledge" of the danger. *Id.* at 856, 858. The court found the crewmember's injury "directly attributable to the unsound and unseaworthy condition of this rope, resulting from the willful negligence and wanton indifference of the master." *Id.* at 860.

After awarding more than $1,500 for lost wages and suffering, the court considered "add[ing] the sum of $500, in consideration of the neglect and indifference" with which the master treated the plaintiff. *Id.* at 860. The court decided against that additional sum only because there was some question whether the plaintiff was partially negligent himself. *See id.* ("[U]nder the circumstances, I prefer to err in fixing the amount of damages against the libelant rather than in his favor."). That punitive damages were denied on the facts "does not draw into question the basic understanding that punitive damages were considered an available maritime remedy." *Townsend*, 557 U.S. at 412 n.2.[7]

Pre-Jones Act cases premising liability on negligence provide additional guidance. As *The Osceola* held, there was no negligence action available to injured crewmembers under general maritime law, and thus such cases are best understood as sounding in unseaworthiness. *See* 189 U.S. at 174-75 (examining, for example, *The A. Heaton*, 43 F. 592 (C.C.D. Mass. 1890), which "assume[s] the right of the seamen to recover against the masters or owners for . . . wilful or negligent acts," but was in fact a case "of injuries arising from unseaworthiness, although the learned judge . . . does not draw a distinction"). *The Troop* fits that mold, with the court of appeals expressly invoking negligence as a basis for liability in affirming the judgment, which as noted included

---

[7] Although *The Noddleburn* arguably applied English law in part (while also citing federal law), it is a venerable unseaworthiness precedent. This Court relied on it in pronouncing the existence of an unseaworthiness action under general maritime law. *See The Osceola*, 189 U.S. at 174-75; *see also Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 68 (1913) (relying on English law).

a "punitive element" (*Townsend*, 557 U.S. at 414).[8] Similarly, in *Latchtimacker v. Jacksonville Towing & Wrecking Co.*, 181 F. 276 (C.C.S.D. Fla.), *aff'd*, 184 F. 987 (5th Cir. 1910) (per curiam), an action by a crewmember who alleged the ship was "so negligently" operated "as to cause his injuries," the court acknowledged that, had "wantonness or reckless negligence" been established, "exemplary damages might have been awarded." *Id.* at 276, 278.

In *Townsend*, this Court acknowledged that "the handful of early cases involving maintenance and cure, by themselves, d[id] not definitively resolve the question of punitive damages availability in such cases." 557 U.S. at 414 n.4. That did not alter the Court's conclusion because "the general common-law rule made punitive damages available in maritime actions," *id.*, and there was "no evidence that claims for maintenance and cure were excluded from this general admiralty rule," *id.* at 414-15. That reasoning applies squarely here. As in *Townsend*, the "early cases support" – "rather than refute" – the availability of punitive damages in unseaworthiness actions. *Id.* at 415 n.4.

---

[8] *See The Troop*, 128 F. at 863 (district court did not err in finding "negligence in the failure of the master to send the appellee back to the hospital at Fusan, gross negligence in the treatment of the appellee at sea, and further negligence in the failure to send the appellee immediately to a hospital on arriving at Port Angeles, from all of which negligent acts the appellee has been permanently crippled, and disabled from following his calling as a mariner").

### C. *Miles* Addressed The Remedy For A Newly Created Cause Of Action And Does Not Apply To Remedies And Claims That Pre-Dated The Jones Act

*Miles v. Apex Marine Corp.* is not applicable here. There, this Court confirmed that the Jones Act "abrogat[ed]" the pre-existing general maritime law rule barring recovery for wrongful death. *Miles*, 498 U.S. at 24. Having created a new general maritime law wrongful-death action to match the Jones Act, the Court held that it would be "inconsistent" "to sanction more expansive remedies" than Congress provided for under the Jones Act wrongful-death provision. *Id.* at 32-33. As the Court explained in *Townsend*, "it was only because of congressional action that a general federal cause of action for wrongful death on the high seas and in territorial waters even existed." 557 U.S. at 420. "As a result," the Court explained, "to determine the remedies available under the common-law wrongful-death action, 'an admiralty court should look primarily to the[] legislative enactments for policy guidance.'" *Id.* (quoting *Miles*, 498 U.S. at 27).

Petitioner's repeated reliance (at, *e.g.*, 15-16, 20-21) on the *Miles* Court's discussion of the respective roles of Congress and the courts of admiralty "plucks" that discussion "from its context and thereby transforms its meaning." *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1329 n.7 (2015). That discussion occurred in the context of determining the scope of recovery under a new general maritime law action that the Court had created to parallel a statutory action. In that context, the Court appropriately looked to the statutory action's scope in fashioning the general maritime law.

*Townsend* dictates a different approach in this context. Here, "[u]nlike the situation presented in *Miles*, both the general maritime cause of action" – unseaworthiness – "and the remedy (punitive damages) were well established before the passage of the Jones Act." 557 U.S. at 420. Respondent seeks recovery for his own injuries and does not invoke the wrongful-death action recognized in *Moragne* and defined in *Miles*. The damages available under the Jones Act are therefore not "determinative" here anymore than in *Townsend*. *Id.* at 424 n.12.

Moreover, even in the wrongful-death context, this Court has recognized that congressional action does not "preclude" the Court from recognizing "new" rights to recovery under general maritime law that are "already logically compelled by our precedents." *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 820 (2001); *see Townsend*, 557 U.S. at 421 (discussing *Garris*). The punitive-damages remedy that the court of appeals permitted here is not "new," but it is "compelled" by this Court's precedent in *Townsend*.[9]

In asserting (at 23-24) that this case is governed by *Miles* because the underlying basis for liability in that case was unseaworthiness, petitioner fails to recognize that *Miles* involved "a cause of action for wrongful death," which "maritime law d[id] not afford," even when the death resulted from unseaworthiness. 498 U.S. at 23. In contrast, this case

---

[9] *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), which petitioner cites (at 20-21), applied the same approach as *Miles* and reached the same result, declining to authorize loss-of-society damages in a general maritime law wrongful-death action brought by injured passengers (rather than crewmembers). That decision does not apply here for the same reasons *Miles* does not apply.

involves the unseaworthiness cause of action for injured crewmembers that existed under the general maritime law long before the Jones Act's passage. The *Miles* Court confirmed that the Jones Act "evinces no general hostility to recovery under maritime law" and did "not disturb seamen's general maritime claims for injuries resulting from unseaworthiness." *Id.* at 29; *see also id.* at 36 (acknowledging the general principle that "'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy'") (quoting *The Sea Gull*, 21 F. Cas. 909, 910 (C.C.D. Md. 1865) (No. 12,578) (Chase, C.J.)). As in *Townsend*, "[l]imiting recovery for [unseaworthiness] to whatever is permitted by the Jones Act would give greater pre-emptive effect to the Act than is required by its text, *Miles*, or any of this Court's other decisions interpreting the statute." 557 U.S. at 424-25.

## II. IN ANY EVENT, THE JONES ACT PERMITS PUNITIVE DAMAGES

Because the Jones Act is not "determinative of" an injured crewmember's "remedies" under pre-existing general maritime claims, the *Townsend* Court did not need to decide whether the Jones Act permits punitive damages. 557 U.S. at 424 n.12. That approach is appropriate here as well. *See supra* Part I.

Petitioner, however, cannot prevail without establishing that the Jones Act and FELA prohibit recovery of punitive damages. Indeed, that is petitioner's lead argument (at 15-19). If the Court reaches those questions, it should hold that the Jones Act and FELA permit punitive damages in appropriate cases.

### A. The Jones Act And FELA Permit Punitive Damages

The Jones Act authorizes crewmembers to recover for injuries resulting from employer negligence and incorporates FELA, which governs comparable actions by railway workers. *See supra* p. 4. Thus, if punitive damages are available under FELA, they are available under the Jones Act.[10]

#### 1. FELA's text authorizes recovery of "damages" without limitation

FELA provides broadly that "common carrier[s] by railroad" engaged in interstate commerce "shall be liable *in damages* to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative." 45 U.S.C. § 51 (emphasis added); *see* An Act Relating to the liability of common carriers by railroad for their employees in certain cases, ch. 149, § 1, 35 Stat. 65, 65 (1908) (same). Nothing in FELA's text limits the types of "damages" available when railway workers are injured or killed in the course of their employment.[11]

---

[10] The converse is not necessarily true. *See* Injured Crewmembers Amici Br. 28-31.

[11] *See Black's Law Dictionary* 314 (2d ed. 1910) (defining "damages" as including "[e]xemplary damages . . . awarded to the plaintiff . . . to punish the defendant for his evil behavior or to make an example of him, . . . also called 'punitive' or 'punitory' damages"); *Black's Law Dictionary* 316 (1891) ("damages" includes "[v]indictive damages . . . also called 'exemplary' or 'punitive'").

In *Vreeland*, this Court interpreted FELA's wrongful-death provision as permitting recovery for pecuniary losses only, even though "[t]he word 'pecuniary' did not appear" in the statute, because "Lord Campbell's act . . . and all those which follow it ha[d] been continuously interpreted as providing only for

Punitive damages therefore are presumptively available under FELA because, "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 70-71 (1992); *see Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."); *see also Smith v. Wade*, 461 U.S. 30, 34 (1983) (looking to common law to confirm availability of punitive damages under 42 U.S.C. § 1983 "[i]n the absence of more specific guidance" in the statute).

This Court reached a similar conclusion in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). There, the Court "accorded broad scope to the statutory term 'injury' . . . in light of FELA's remedial purposes" and held that "claims for damages for negligent infliction of emotional distress are cognizable under FELA." *Id.* at 549-50. That same approach dictates a broad, plain-language interpretation of "damages" as including punitive damages.

**2. Pre-FELA common law permitted punitive damages**

Permitting punitive damages comports with the common-law backdrop against which FELA was enacted. *See Gottshall*, 512 U.S. at 557 ("[o]ur FELA cases require that we look to the common law when considering the right to recover").

---

compensation for pecuniary loss or damage." 227 U.S. at 71. In light of the common-law background permitting recovery of punitive damages, *see infra* pp. 34-36, *Vreeland*'s approach supports giving "damages" its ordinary meaning as encompassing punitive damages.

Before FELA, injured railway workers seeking to recover against their employers for on-the-job injuries could bring negligence actions under the common law.[12] In such tort actions – as was and is generally true at common law, *see Townsend*, 557 U.S. at 409 – punitive damages were available in appropriate cases. *See Prentice*, 147 U.S. at 107 (calling the doctrine of "exemplary, punitive, or vindictive damages" "well settled"); *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U.S. 489, 492 (1876) (same); *Philadelphia, W. & B. R.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 214 (1859) ("[w]henever the injury complained of has been inflicted maliciously or wantonly, . . . the jury are not limited to the ascertainment of a simple compensation for the wrong").

Congress passed FELA to make it easier for injured workers' actions to succeed, and this Court has "liberally construed" the statute "to further Congress' remedial goal." *Gottshall*, 512 U.S. at 543.[13] "In order to further FELA's humanitarian purposes, Congress did away with several common-law tort defenses that had effectively barred recovery by

---

[12] *See, e.g., Santa Fe Pac. R.R. Co. v. Holmes*, 202 U.S. 438, 438 (1906) (action "for damages for injuries received by [plaintiff] in a head-on collision of two trains, on one of which he was an engineer"); *Texas & Pac. Ry. Co. v. Swearingen*, 196 U.S. 51, 53 (1904) ("action . . . to recover damages for personal injuries sustained by reason of the alleged negligence of the defendant company").

[13] *See Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 145 (2003) ("Enacted in 1908, Congress designed the FELA to 'shift part of the human overhead of doing business from employees to their employers.'") (quoting *Gottshall*, 512 U.S. at 542) (alteration omitted); *see also Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring) ("[FELA] was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations.").

injured workers," *id.* at 542, and permitted recovery for wrongful death. Other than the ways FELA *broadened* railway workers' causes of action, the statute did not alter the traditional common-law landscape. *See id.* at 544 ("Only to the extent of these explicit statutory alterations is FELA an avowed departure from the rules of the common law.").

Accordingly, the remedies traditionally available at common law – including punitive damages – are available under FELA. *See id.* at 551 (where issue "not explicitly addressed in the statute, the common-law background of this right of recovery must play a vital role in giving content to the scope of an employer's duty under FELA"). That default rule is not specific to FELA (though it applies with special force in that context). This Court repeatedly has held that, "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993); *accord Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."). Because FELA did not disturb the common-law rule permitting punitive damages, such damages remain available under FELA – and thus under the Jones Act.

### B. Petitioner Fails To Show That Punitive Damages Are Precluded Under Either FELA Or The Jones Act

Petitioner addresses (at 17-19) neither the text of FELA (or the Jones Act) nor the common-law authority identified above. Instead, petitioner pins its

argument on citations to inapposite decisions of this Court and erroneous lower-court decisions.

### 1. No decision of this Court makes punitive damages unavailable under FELA

Petitioner relies (at 18) on *Seaboard Air Line Railway v. Koennecke*, 239 U.S. 352 (1915), but that case did not decide the scope or types of damages available under FELA. *Koennecke* affirmed a judgment against a railroad in a wrongful-death action. *Id.* at 353-54. In addressing the railroad's argument that it was unfairly surprised by the plaintiff's request to amend the complaint to seek relief under FELA, the Court observed that the original complaint was ambiguous as to the source of law invoked. "If it were read as manifestly demanding exemplary damages, that would point to the state law," *id.* at 354, because the pertinent state statute expressly allowed exemplary damages, *see id.* at 353. On the other hand, the Court noted, "the [complaint's] allegation of dependence was relevant only under the act of Congress," *id.* at 354, because FELA's wrongful-death provision authorizes recovery for relatives "dependent upon [the deceased] employee," 45 U.S.C. § 51. Notably, although the Court observed that "the allegation of dependence was relevant *only* under the act of Congress," 239 U.S. at 354 (emphasis added), it did not similarly suggest that the demand for exemplary damages was relevant *only* under the state statute. *See also* Injured Crewmembers Amici Br. 22-24.

Punitive damages were not addressed at all in the remaining cases petitioner cites (at 17-18 & n.4), all of which considered only compensatory damages and none of which involved allegations of fault beyond simple negligence. *See St. Louis, Iron Mountain & S.*

*Ry. Co. v. Craft*, 237 U.S. 648, 655-61 (1915) (reviewing award of compensatory damages for pain and suffering in survival action); *Gulf, Colo. & S. Fe Ry. Co. v. McGinnis*, 228 U.S. 173, 174-76 (1913) (reviewing award of compensatory damages to non-dependent relative in wrongful-death action); *American R.R. Co. of Porto Rico v. Didricksen*, 227 U.S. 145, 149-50 (1913) (addressing types of compensatory damages available in wrongful-death action); *Vreeland*, 227 U.S. at 68-70 (same); *see also Pacific S.S. Co. v. Peterson*, 278 U.S. 130 (1928) (availability of punitive damages not addressed) (Pet. Br. 20).

None of the decisions petitioner cites undermines the plain-meaning interpretation of "damages" in FELA, which, particularly when read in light of the common-law background, includes punitive damages.

**2. The lower-court decisions on which petitioner relies are in error**

The court of appeals cases on which petitioner relies (at 18-19) for the proposition that punitive damages are not permitted under FELA and the Jones Act all stem from a fundamental misinterpretation of this Court's decision in *Vreeland*. There, this Court construed FELA's wrongful-death provision in light of other wrongful-death statutes that had been interpreted "as providing only for compensation for pecuniary loss." 227 U.S. at 71. In the lower-court decisions on which petitioner relies, the courts disregarded *Vreeland*'s wrongful-death context and asserted broadly that recovery under FELA – and, by incorporation, the Jones Act – is in all types of cases "limited to 'pecuniary' losses." *E.g.*, *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560 (9th Cir. 1984). The courts then reasoned that "[p]unitive damages are non-pecuniary" and therefore "may not be award-

ed on a claim of negligence based on the Jones Act." *Id.* at 561 (personal-injury case).[14]

**a.** The reasoning *Kopczynski* exemplifies is entirely incorrect as applied to personal-injury cases. *Vreeland*, on which *Kopczynski* and the other lower courts relied, involved the unique limitations on compensatory damages that apply in wrongful-death actions. As wrongful-death statutes have been interpreted, the scope of the compensatory damages available to the deceased worker's relatives is limited to their pecuniary losses and does not encompass non-pecuniary damages, such as "damages by way of recompense for grief or wounded feelings." 227 U.S. at 70; *see Miles*, 498 U.S. at 32 ("no recovery for loss of society in a Jones Act wrongful death action"); *supra* pp. 7-8.

Unlike in wrongful-death cases, FELA and the Jones Act permit *injured* workers (such as respondent) to recover both pecuniary *and non-pecuniary* damages. In *Gruenenthal v. Long Island Railroad Co.*, 393 U.S. 156 (1968), for example, this Court upheld a jury award in a personal-injury case under FELA that included damages for pain and suffering, *see id.* at 161-62, a classically non-pecuniary loss, *see Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 123 (1998) (addressing "the recovery of nonpecuniary losses, such as pre-death pain and suffering"). As a leading treatise published before the passage of

---

[14] *Kopczynski* relied on *Kozar v. Chesapeake & Ohio Railway Co.*, 449 F.2d 1238 (6th Cir. 1971), which reasoned similarly. *Wildman v. Burlington Northern Railroad Co.*, 825 F.2d 1392 (9th Cir. 1987), and *Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (6th Cir. 1993), relied upon the analysis – and thus the errors – in *Kopczynski* and *Kozar*. *See also* Injured Crewmembers Amici Br. 25-28 (explaining additional errors).

the Jones Act confirms, "[i]n an action for personal injury" under FELA, "the plaintiff is entitled to recover . . . a reasonable sum for his pain and suffering." 5 Sutherland on Damages § 1331, at 5088; *see also Gottshall*, 512 U.S. at 556 (allowing recovery of damages "for emotional injury caused by fear of physical injury"). Indeed, *Vreeland* itself acknowledged that, had the plaintiff survived his injuries, he could have recovered for "suffering," among other things. 227 U.S. at 65. Ample authority confirms that non-pecuniary damages are equally available in personal-injury actions under the Jones Act.[15]

Thus, the key premise of *Kopczynski* and the other cases on which petitioner relies – that recovery under FELA and the Jones Act is limited to pecuniary damages – has no application in cases brought by injured workers, such as respondent. Respondent here seeks recovery for personal injuries under the Jones

---

[15] *See, e.g.*, *Calo v. Ocean Ships, Inc.*, 57 F.3d 159, 162 (2d Cir. 1995) (affirming pain-and-suffering award in injured crewmember's Jones Act action); *Figueroa v. Campbell Indus.*, 45 F.3d 311, 316 (9th Cir. 1995) (injured crewmember "entitled to recover for his pain and suffering under the Jones Act"); *Koehler v. United States*, 200 F.2d 588, 591 (7th Cir. 1953) (plaintiff entitled to $2,500 in Jones Act damages for pain and suffering).

The same rule applies in survival actions, which permit the personal representative of a deceased worker's estate to pursue any claim that the decedent had at the time of death. *See, e.g.*, *Craft*, 237 U.S. at 657-61 (FELA's survival provision allows recovery for deceased worker's "pain and suffering" before death); *McBride v. Estis Well Serv., L.L.C.*, 853 F.3d 777, 781 (5th Cir. 2017) ("[u]nder the Jones Act," a representative bringing a survival action on behalf of a deceased crewmember's estate "can recover damages for pre-death pain and suffering"), *cert. denied*, 138 S. Ct. 644 (2018); *see also Miles*, 498 U.S. at 22, 37 (affirming judgment that included award of damages for pain and suffering in survival action).

Act and is accordingly entitled to seek both pecuniary and non-pecuniary damages. Therefore, even if petitioner's cases were right that "[p]unitive damages are non-pecuniary," *Kopczynski*, 742 F.2d at 561, punitive damages are permitted here.

Petitioner offers no defense of that fundamental defect in its theory. It appears to acknowledge in passing (at 27) that "the FELA/Jones Act bar on compensatory damages for non-pecuniary harms may apply only in wrongful-death actions, and not personal-injury cases." Petitioner asserts that it does not matter because "*the courts* have consistently recognized that punitive damages are not available under FELA and the Jones Act at all . . . even in personal-injury actions." Pet. Br. 28 (citing, *e.g.*, *Kopczynski*) (emphasis added). But the court decisions on which petitioner relies are indefensible as applied to this case. They apply a pecuniary-loss limitation on wrongful-death recovery that petitioner itself concedes is inapplicable to personal-injury cases such as this one.

**b.** In any event, even in the wrongful-death context, a bar on non-pecuniary compensatory damages does not preclude punitive damages. It is perfectly consistent to require that *compensatory* damages be pecuniary in nature while also honoring the common-law availability of punitive damages. Those distinct remedies serve distinct purposes, and the reasons for denying compensation for non-pecuniary losses, which are peculiar to the history of wrongful-death recovery, provide no basis for shielding violators of maritime law from punitive damages. *See* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 80 (1997); App. 11a.

The state statutes on which *Vreeland* and *Miles* relied in construing FELA's and the Jones Act's wrongful-death provisions to preclude recovery for non-pecuniary losses support that conclusion. *Vreeland* explained that Lord Campbell's Act "and *all* those which follow it have been *continuously* interpreted" as permitting recovery of pecuniary losses only. 227 U.S. at 71 (emphases added). State statutes did *not* follow such a consistent approach with respect to punitive damages, however. A number of States in fact permitted punitive damages in wrongful-death actions, including some States that followed the pecuniary-loss limitation with respect to compensatory damages.[16] Thus, the statutory background on which *Vreeland* relied does not support imposing an a-textual gloss excluding punitive damages from the "damages" recoverable under FELA.

Petitioner is correct (at 28) that "allowing seamen to recover punitive damages for personal injuries but not wrongful death[] has little to recommend it." The law does not require that discordant result: FELA's pecuniary-loss limitation in wrongful-death actions says nothing about punitive damages, which were historically, and are now, available to FELA and Jones Act plaintiffs alike.

---

[16] *See* 5 Sutherland on Damages § 1263, at 4865-69 (collecting cases); Injured Crewmembers Amici Br. 21-22 & n.8 (same); *see also, e.g., Calcaterra v. Iovaldi*, 100 S.W. 675, 676, 677 (Mo. Ct. App. 1906) (explaining in wrongful-death case that, with respect to compensatory damages, "none but pecuniary damages are allowed," while exemplary damages are also available "if there are circumstances of aggravation").

## III. DISALLOWING PUNITIVE DAMAGES WOULD CONTRAVENE CENTURIES OF FEDERAL POLICY

Punitive damages promote important maritime policies, particularly in cases involving the injury or death of a crewmember resulting from willful or wanton misconduct. Petitioner makes no effort to square its facial challenge to punitive damages under general maritime law with *Townsend*, which reaffirmed that injured crewmembers are "entitled to pursue punitive damages" in "appropriate factual circumstances." 557 U.S. at 415. Petitioner's invitation to jettison that fundamental principle rests on outdated theories this Court has rejected and conflicts with sound economic principles.

### A. Punitive Damages Promote Important Maritime Policies

The notion of "damages beyond the compensatory" has existed for millennia. *Baker*, 554 U.S. at 491 (citing, among other things, the Code of Hammurabi). American courts have allowed punitive-damages awards "since at least 1784." *Townsend*, 557 U.S. at 410. The availability of punitive damages is "a firmly established feature of American law." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 26 (1991) (Scalia, J., concurring in the judgment).

Punitive damages serve to punish egregious misconduct and deter the defendant and others from repeating it. *See Townsend*, 557 U.S. at 409 (punitive damages serve "as a punishment to the guilty" and "to deter from any such proceeding for the future"); *Baker*, 554 U.S. at 492 (punitive damages "are aimed . . . principally at retribution and deterring harmful conduct"); *see also Kemezy v. Peters*, 79 F.3d 33, 35 (7th Cir. 1996) (Posner, J.) (when a criminal

prohibition exists, punitive damages also "relieve the pressures on the criminal justice system"). Before the Jones Act, "[t]he general rule that punitive damages were available" as "punishment" for "lawless misconduct" was well-established in general maritime law. *Townsend*, 557 U.S. at 411.

Punitive damages are particularly appropriate in cases involving the injury or death of a crewmember. *See id.* at 412-13. A fundamental tenet of admiralty is that "seamen" are "emphatically" its "wards," *Harden v. Gordon*, 11 F. Cas. 480, 485 (C.C.D. Me. 1823) (No. 6,047) (Story, J.), entitled to "special solicitude," *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970). Crewmembers subject to willful or wanton misconduct may "recover not only actual damages but exemplary – such as would vindicate his wrongs, and teach the tort feasor the necessity of reform." *The Golden Gate*, 16 F. Cas. at 143.

The law provides that extra protection not as a matter of charity. Rather, maritime law recognizes that crewmembers face extraordinary perils in the ordinary course of working in "commercial service" and the "maritime defence of the nation." *Harden*, 11 F. Cas. at 483. The deterrent effect of punitive damages promotes a safer environment for workers in commerce and national defense. Moreover, imposing punitive damages for aggravated misconduct resulting in injury, but not death, protects the crewmember who must return to the same employer's vessel by deterring the employer from repeating the misconduct and harming the worker again.

**B. Petitioner's Policy Arguments Are Unsound**

1. Petitioner chiefly complains (at 34) of "overdeterrence": that damages awards exceeding the cost of the harm encourage "wasteful precautions" that

cost more than the harm they avoid. But *Baker* rejected suggestions that the availability of punitive damages has "mass-produced runaway awards" or that recent data show a "marked increase in the percentage of cases" in which punitive damages are awarded. 554 U.S. at 497-98; *see id.* at 497 ("the most recent studies tend to undercut much of" the criticism of punitive damages). Indeed, *Baker* rejected as unpersuasive some of the specific scholarship on which petitioner relies. *See id.* at 498 n.15 (observing, *e.g.*, that Polinsky article cited at Pet. Br. 36 n.12 fails to "establish[] a clear correlation").

If petitioner's fear were justified, there would be evidence bearing it out following *Townsend*'s approval of punitive damages for withholding maintenance and cure. Yet, as petitioner's *amici* admit, the sky has not fallen: "grave consequences have not followed from this Court's decision in" *Townsend*. At-Sea Processors Ass'n et al. Amici Br. 7 n.6.[17]

Similarly, petitioner acknowledges (at 32-33 & n.9) that at least four maritime circuits expressly recognized the availability of punitive damages in unseaworthiness actions for many years, including two circuits (the Ninth and Eleventh) in which punitive damages have always been available, *see* App. 2a n.2. Yet petitioner cites no punitive-damages award from those circuits imposing the sorts of "adverse consequences" (Pet. Br. 34) it envisions.

---

[17] The lack of a surge in punitive-damages awards suggests that they are functioning as intended. "Punitive damages are meant as a threat to discourage egregious misconduct. If the threat is well-designed, such damages should not have to be actually awarded very often. We want the threat to *work*." Robertson, 28 J. MAR. L. & COM. at 162-63.

2. Petitioner's overdeterrence concern is also economically incoherent.

a. Deterring the types of particularly blameworthy conduct that merits punitive damages *requires* that the cost of such conduct exceed the harm it causes. Such conduct is undertaken in the pursuit of "some specific gain" – *e.g.*, avoiding the cost of maintaining a seaworthy ship. William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, REGULATION 33, 33 (Sept./Oct. 1986) ("Landes & Posner"). If that gain exceeds the cost of the harm it causes, it will not be deterred. *See Kemezy*, 79 F.3d at 34 (no deterrence from damages if "the benefits to [the defendant] are greater"); *see also, e.g., Anderson v. General Motors Corp.*, No. BC116926, 1999 WL 34868593 (Cal. Super. Ct. Aug. 26, 1999) (finding that General Motors "conscious[ly] disregard[ed]" "safety, in order to maximize profits"). Compensatory damages will be merely the cost of doing business.

Moreover, the cost of paying only compensatory damages usually will be low – and thus will fail to deter. Many crewmembers are modestly paid; a 2006 article, for example, reported that cruise line crewmembers earn between "less than $2 an hour" and "up to $3000" per month. Susan Lee, *Cruise Industry Liens Against the U.S. Penalty Wage Act*, 31 TUL. MAR. L.J. 141, 144-45 (2006).[18] Insofar as compensatory damages are guided by the injured plaintiff's lost earning potential, the cost of risking harm to

---

[18] The largest (outlier) compensatory-damages awards the Chamber of Commerce could locate were for $1.1 and $1.8 million. *See* Chamber of Commerce et al. Amici Br. 7; *cf. Baker*, 554 U.S. at 476, 515 (compensatory damages of $507.5 million in environmental disaster).

members of the crew could pale next to the cost of taking proper precautions.

**b.** The overdeterrence concern is especially misguided with respect to intentional harms, which the tortfeasor – knowing what it is doing – "may try to conceal." Landes & Posner at 33. In that case, compensation-only awards "provide inadequate deterrence" because, counting the times the defendant gets away with it, the gains greatly exceed the costs. *Id.*; *see Kemezy*, 79 F.3d at 35 (if "a person who goes around assaulting other people is caught only half the time," then "in comparing the costs, in the form of anticipated damages, of the assaults with the benefits to him, he will discount the costs ... by 50 percent, and so in deciding whether to commit the next assault he will not be confronted by the full social cost of his activity"). The intentional acts of an unscrupulous vessel owner or unfit crew at sea can be quite difficult to prove months later, back on shore.

Relatedly, "heavier punitive awards have been thought to be justifiable when wrongdoing is hard to detect (increasing chances of getting away with it)," "[r]egardless of culpability." *Baker*, 554 U.S. at 494. Unseaworthiness actions often concern latent injuries that do not "occur[] openly" (Pet. Br. 35 n.11) – and that are thus difficult to detect and prove and easier to get away with. *See, e.g., Vaughn v. Farrell Lines, Inc.*, 937 F.2d 953, 955 (4th Cir. 1991) (describing unseaworthiness claim brought by wife of deceased crewmember who, over "his career ... on various vessels," "was exposed to ... asbestos, which

caused his death, in the boilers and engine rooms of the vessels in which he served").[19]

c. Petitioner lists (at 37-40) a host of speculative fears of rising operating costs and consumer prices. Those arguments, too, reflect unsound economics.

*First*, a rational firm need only avoid "wanton, willful, or outrageous conduct," *Townsend*, 557 U.S. at 409, to obviate the risk of punitive-damages liability. And the social *benefit* of that adjustment – of "tilting cost-benefit analyses towards safer practices"[20] – will redound to the public in the form of safer ships, safer waterways, and enhanced national security. Conversely, eliminating punitive damages would reward corner-cutting, which punitive damages deter by preventing a firm (or ship captain) that takes morally culpable risks "from gaining an unfair advantage over its more socially responsible competitors."[21]

---

[19] Because unseaworthiness cases can involve intentional conduct, conduct motivated by financial gain, difficult-to-detect injuries, and low compensatory-damages awards, among other factors, a cap on punitive damages would be inappropriate. *See Baker*, 554 U.S. at 513 (distinguishing cases with conduct that is "intentional or malicious," is "driven primarily by desire for gain," or causes only "modest economic harm or odds of detection"). In any event, this case on the pleadings does not present the question whether punitive damages under unseaworthiness should be capped. *See Townsend*, 557 U.S. at 424 n.11 (declining to address the issue).

[20] Andrew B. Nick, *Market Share Liability & Punitive Damages: The Case for Evolution in Tort Law*, 42 COLUM. J.L. SOC. PROBS. 225, 234 (2008).

[21] Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 16 (1992); *cf.* Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 F.S.U.

*Second*, the fear of rising consumer costs ignores the reality that, in a competitive market, firms with higher costs cannot simply pass those costs on without sacrificing business.[22] Firms that wantonly disregard the safety of the workers they employ may well risk punitive-damages awards. But firms that behave responsibly will avoid that increased exposure, operate with relatively *lower* costs, and gain a competitive advantage. To compete effectively, the bad actor will not have the option to raise prices; rather, it will be forced to reduce costs by operating safe ships – the better outcome.

By contrast, a regime in which wanton misconduct *costs no more* than the occasional negligent slip-up removes any incentive to behave responsibly. That forces *good* actors to subsidize the more blameworthy acts of their less responsible competitors. And those perverse incentives ultimately undermine admiralty's flagship pursuit: the protection of crewmembers.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

---

L. Rev. 653, 656 (1993) ("[s]afe products may not be able to compete if they sell for a higher price than dangerous ones").

[22] *Cf.* J. Hoult Verkerke, Note, *Compensating Victims of Preferential Employment Discrimination Remedies*, 98 YALE L.J. 1479, 1498 n.117 (1989) ("a firm that sells its products and buys its labor in perfectly competitive markets will be unable to pass on any compensation costs to customers or workers because any increase in the firm's product price would cause it to lose all of its business").

Respectfully submitted,

PRESTON EASLEY
LAW OFFICES OF
PRESTON EASLEY APC
2500 Via Cabrillo Marina
Suite 106
San Pedro, CA 90721
(310) 832-5315

DAVID C. FREDERICK
*Counsel of Record*
BRENDAN J. CRIMMINS
BENJAMIN S. SOFTNESS
LILLIAN V. SMITH
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

February 21, 2019